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UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF CALIFORNIA

DANIEL CAI & TOM TANG

Plaintiff,

vs.

CCL GROUP INC., DBA YOTAKA SUSHI
BAR & GRILL, EVELYN TANG & DOES 1
TO 10,

Defendants

Case No.: C07-06444 JL
C06-07912 JL

**NOTICE OF PLAINTIFFS' MOTION TO
FOR LEAVE TO FILE FIRST AMENDED
AMEND THE COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO FILE FIRST
AMENDED COMPLAINT**

Date: September 3, 2008
Time: 9:30 AM
Judge: Honorable James Larson
Trial Date: None

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

THE NOTICE IS HEREBY GIVEN that on September 3, 2008 at 9:30 a.m., Plaintiffs will move for the leave to file the First Amended Complaint ("FAC"), attached hereto as Exhibit 1, to allege civil penalties under California Labor Code § 558 on behalf of Plaintiffs themselves pursuant to Labor Code Private Attorney General's Act, California Labor Code § 2699, *et seq.* ("PAGA"), to hold person acting on behalf of corporate Defendant CCL Group Inc. personally liable for Labor Code violations alleged in the Complaint.

This motion is supported by the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Leave to File A First Amended Complaint, the Declaration of Adam Wang

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1 in support thereof, the other records, pleadings, and papers filed in this action; and upon such
 2 other documentary and oral evidence or argument as may be presented to the Court at the hearing
 3 of this motion.

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 I. INTRODUCTION

6 Plaintiffs Daniel Cail and Tom Tang were employed by Defendant CCL Group Inc. who
 7 operated a successful restaurant Yotaka Sushi Bar and Grill in Danville, California. During the
 8 four years prior to their filing of the Complaint, Plaintiffs were required to work in excess of 8
 9 hours a day and 40 hours a week on regular basis, but were not paid required overtime wage. In
 10 the current Complaints, Plaintiffs allege violations of California Labor Code and Fair Labor
 11 Standards Act ("FLSA"), seeking unpaid overtime and associated penalties.

12 In the current separate pleadings, Plaintiffs name CCL Group Inc. and individual
 13 Defendant Evenly Tang. The Complaint s allege that Evenly Tang is the owner, officer and
 14 manager of CCL Group Inc. having control over Plaintiffs' work condition and work situation,
 15 Complaints, at ¶ 4. The Complaints also alleges that Evenly Tang acted as alter ego for CCL
 16 Group Inc., Complaints, at ¶ 5.

17 The FAC will combine the two separate Complaints, and serve as a consolidated
 18 complaint. FAC also seeks to add a cause of action for unpaid wages pursued as civil penalties
 19 under California Labor Code § 558 against CCL Group Inc., as well as persons acting on behalf
 20 of CCL Group Inc. Under FLSA, corporate officers and managers having control over
 21 employees' work conditions and work situations are individually liable for unpaid overtime. See
 22 Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). However,
 23 FLSA affords less protection than California Labor Code. Specifically, when an employee was
 24 paid a fixed sum of salary, like the case here, and worked substantial overtime, the California
 25 Labor Code entitles employee to recover more overtime than the FLSA. See Espinoza v. Classic
 Pizza Inc., 114 Cal.App.4th 968 (2003). As such, Plaintiffs may not recover the full amount

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1 afforded under California labor Code against Evenly Tang individually unless Evenly Tang is
2 also held individually liable under California Labor Code § 558.

3 **II. ARGUMENTS**

4 **A. RULE 15 IS LIBERALLY APPLIED**

5 "Rule 15's policy favoring amendments to pleadings should be applied with 'extreme
6 liberality.'" DCD Programs, Ltd. v. Leihgton, 833 F.2d 183, 186 (9th Cir. 1987). The underlying
7 purpose of Rule 15 is to "facilitate decision on the merits rather than on the pleadings or
8 technicalities." Roth v. Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991). It is the party
9 opposing the motion to amend that "bears the burden of demonstrating that a substantial reason
10 exists to deny leave to amend." State of Cal. ex rel. Mueller v. Walgreen Corp., 175 F.R.D. 631,
11 637 (N.D. Cal. 1997) (citing Shipner v. Eastern Air Lines, Inc., 868 F.2d 401, 407 (11th Cir.
12 1989)). "Unless a substantial reason exists to deny leave to amend, the discretion of the district
13 court is not broad enough to permit denial." Shipner, 868 F.2d at 407.

14 Parties have only taken written discovery; no depositions have been taken. Most
15 importantly, the new cause of action bases on the same facts underlying the claims for unpaid
16 overtime and unpaid meal premiums alleged in the exiting complaints. As such, the addition of a
17 new liability theory based on PAGA for unpaid overtime and meal premiums does not implicate
18 any new facts, and does not affect discovery deadline as proposed by Parties and adopted by the
19 Court. Therefore, the proposed amendment will not prejudice the Defendants in any conceivable
20 way. Accordingly, no substantial reason exists to deny leave to amend.

21 **B. DEFENDANT EVENLY TANG IS LIABLE UNDER CALIFORNIA LABOR CODE § 558**

22 Under California Labor Code § 558, the employer and the person acting on behalf of the
23 employer are liable for the unpaid wage and unpaid meal premiums collected as civil penalties
24
25

pursuant thereto¹. In the discovery, Defendants admitted that Evenly Tang is a 100% owner of the corporate Defendant who employed Plaintiffs; and that Evenly Tang acted on behalf of CCL in hiring at least Plaintiff Tom Tang; calculating and paying the wages of both Plaintiffs. As such, Defendant Evenly Tang is liable for unpaid wages pursued as civil penalties under California Labor Code § 558, enforced through Private Attorney General's Act, Cal Lab. Code § 2269, *et seq.* See Reynolds v. Bement, 36 Cal. 4th 1075, at 1094 (2005) (conc. opn. of Moreno, J.).

D. PLAINTIFFS WILL SATISFY THE REQUIREMENTS OF CALIFORNIA LABOR CODE § 2699.3

California Labor Code § 558 provides for recovery as civil penalty the unpaid wage and. California Labor Code § 2699 provides that “any provision for a civil penalty to be assessed, may ... be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.” § 2699.3(c) provides that an action under § 558 by an aggrieved employee may be commenced if the employee gave a written notice by certified mail to California Labor and Workforce Development Agency (“CLWDA”) and the employer specifying the section the employer allegedly had violated, and the facts and theories supporting

¹ Labor Code § 558 provides: “Any employer *or other person acting on behalf of an employer* who violates, or causes to be violated, any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages....”(emphasis added)

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1 the alleged violation; and the employer failed to cure the violation within 33 days of the written
2 notice by the employee.

3 On July 28, 2008, Plaintiffs sent a written notice by certified mail to both CLWDA and
4 Defendants CCL Group Inc., and Evenly Tang. Plaintiffs anticipate that Defendants will not
5 cured its violations within 33 days of such notice, and Plaintiffs anticipate that by the time of
6 hearing of this motion, CLWDA will have issued a letter indicating that it does not intend to
7 investigate into the alleged violations by Defendants. As such, Plaintiffs may commence civil
8 action on behalf of themselves and all former and current employees against Defendants
9 pursuant to California Labor Code § 558.

10 **E. DEFENDANTS CANNOT PROVE THAT THE PROPOSED AMENDMENTS ARE FUTILE**

11 In light of the strong policy favoring leave to amend under Rule 15, absent showing that
12 the amendments sought would be futile, there is no reason that Plaintiffs should not be granted
13 leave to amend. Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999). As defendants are
14 unable to make such a showing, the Court should allow Plaintiffs to file the proposed FAC.

15 **F. PLAINTIFFS' PROPOSED AMENDMENT WILL NOT PREJUDICE DEFENDANTS IN**
16 **THIS CASE**

17 Plaintiffs' proposed amendment will not prejudice Defendants in this case. As stated
18 above, the proposed amendment only adds the cause of action to hold Evenly Tang individually
19 liable for unpaid wages under California Labor Code § 558 pursued as civil penalties. This
20 cause of action will base on the same facts underlying the claims for unpaid wages already
21 alleged in the existing complaints. Parties have conducted written discoveries; and such
22 discoveries have revealed that Evenly Tang had acted on behalf of Plaintiffs' employer CCL
23 Group Inc. To date, no depositions have been taken (Wang Decl., ¶ 4). As such, the proposed
24 amendments will not require more resources in litigating matters unrelated from the causes of
25 actions already alleged in the current pleadings.

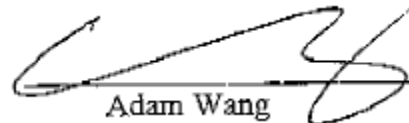
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Furthermore, the current Complaints surround around the payroll practice and overtime policy of Defendants. The proposed amendment seeking unpaid overtime wages for all employees will not change the operative facts alleged in current Complaint. As such, Defendants' ability to preserve documents and witness testimony, and prepare the case for trial will not be prejudiced one bit. See Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) (recognizing that "once the defendant is in court on a claim arising out of a particular transaction or set of facts, he is not prejudiced if another claim, arising out of the same facts, is added").

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for leave to file the proposed First Amended Complaint.

Dated: July 28, 2008



Adam Wang
Attorney for Plaintiffs
Daniel Cai & Tom Tang